

A

LEE GIOK TEE

v.

PALLIAN ARUMUGAPERUMAL

B

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ MOHAMAD JCA
GHAZALI MOHD YUSOFF JCA
RAMLY ALI J

[CIVIL APPEAL NO: W-02-21-1996]

C

17 FEBRUARY 2006

CIVIL PROCEDURE: *Service - Notice of hearing sent by post - Whether letter by solicitors could be treated as a notice sent from an office of High Court - Whether there was proof of actual service - Whether presumption of service could be relied upon - Whether probable that solicitor's letter not received - Rules of the High Court 1980, O. 28 r. 5(2), O. 62 rr. 6(1), 11*

The respondent bought the appellant's land, which had been charged to a bank as security for a loan to a company, at a statutory sale by public auction under the National Land Code. The respondent, being unable to obtain possession of the land from the appellant, filed in the High Court an application by originating summons under O. 89 of the Rules of the High Court 1980 ('RHC') for an order of possession. The originating summons was heard on 11 August 1994 in the absence of the appellant and an order for possession was granted on that day. It was also ordered that the deputy registrar assess damages for the respondent. The appellant filed a summons in chambers seeking an order setting aside the orders of 11 August 1994, and consequential and ancillary orders. The appellant's application was dismissed with costs and the appellant appealed to this court. The appellant raised 10 grounds for contending that the appeal should be allowed and the orders for possession and damages ought to be set aside. The first ground was that the appellant was not given notice of the hearing of the originating summons on 11 August 1994; the other grounds went to the merits of the appellant's setting-aside application. In response to the appellant's allegations that she was never informed of the date of the hearing, the respondent averred that his solicitors had, by a letter dated 6 August 1994, for which a certificate of posting was obtained, informed the appellant of the date and forwarded a copy of the court's letter. It was apparent that if the appellant succeeded on

the first ground, the orders made on 11 August 1994 would have to be set aside *ex debito justitiae*, that was to say, without having to consider the merits of the question of whether the respondent was otherwise entitled or not entitled to the order for possession.

Held (allowing the appeal)

Per Abdul Aziz Mohamad JCA:

[1] The respondent's argument that O. 62 r. 11 of the RHC should apply in this case on the basis that, since the solicitors were asked by the court to notify the appellant, their letter should be treated as a notice sent from an office of the High Court, could not be allowed because under O. 28 r. 5(2) of the RHC, it was the respondent's duty to give the notice. In any case, the letter by the solicitors could not realistically be treated as a notice sent from an office of the High Court and neither could the solicitors be treated as the agents of the High Court. The deputy registrar merely informed the solicitors of the date and left it to them, as a duty of the solicitors for the respondent, to inform the appellant. Further, and in any case, the last sentence of O. 62 r. 11 of the RHC seems to have the effect of neutralizing any presumption that the rule may carry if the party concerned categorically denies service, as the appellant did, for that is the only way available to him by which to establish that he has not been served. The respondent's counsel did not mention any other presumption that existed in the respondent's favour. (para 8)

[2] Service on the appellant had not been proved and since there was no proof of actual service, the respondent had to rely on some presumption of service, and none had been shown by the respondent to exist for a letter posted with the support of a certificate of posting. Even if O. 62 r. 6(1) of the RHC were to allow or require service by post, without specifying registered post, it had to be by registered post, and only then would there be a presumption as to the effecting of service and the time when service was effected, which was provided by s. 12 of the Interpretation Acts 1948 and 1967. Apart from the absence of proof of service, the probability was that the appellant did not receive the solicitors' letter. If she did, it was not probable that she would not have attended court on 11 August 1994 to resist the taking over of possession of the property that she was resolved to retain as hers, the more

- A so since she did attend on the previous occasion. For that reason, the appeal was allowed and the orders made on 11 August 1994 were set aside. It was not necessary to consider the merits of the appellant's opposition to the originating summons. There would have to be an *inter partes* hearing of
- B the originating summons at which the appellant would have an opportunity to present the merits of her case. (paras 9, 10 & 11)

Bahasa Malaysia translation of headnotes

- C Responden membeli tanah perayu di satu jualan lelong statutori di bawah Kanun Tanah Negara. Tanah tersebut telah digadaikan ke bank sebagai jaminan kepada pinjaman yang diberikan kepada sebuah syarikat. Responden gagal mendapat milikan tanah dari
- D perayu, dan kerana itu telah memfail permohonan saman pemula di Mahkamah Tinggi di bawah A. 89 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') bagi mendapatkan perintah milikan. Saman pemula didengar pada 11 Ogos 1994 tanpa kehadiran perayu dan satu perintah milikan telah diberikan pada tarikh tersebut. Selain itu, Timbalan Pendaftar telah diperintah supaya mentaksir gantirugi
- E kepada responden. Berikutnya, perayu memfail saman dalam kamar memohon perintah bagi mengenepikan perintah 11 Ogos 1994 serta beberapa perintah lain. Permohonan perayu telah ditolak dengan kos dan perayu merayu ke mahkamah ini. Perayu membangkitkan 10 alasan bagi menghujah mengapa rayuannya
- F harus dibenar dan mengapa perintah-perintah milikan dan gantirugi harus dibatalkan. Alasan pertama perayu adalah bahawa notis pendengaran saman pemula pada 11 Ogos 1994 telah tidak diserahkan kepada beliau; sementara alasan-alasan lain menyentuhi merit permohonan untuk mengenepikan. Bagi menjawab pengataan
- G perayu bahawa ia tidak pernah diserahkan dengan notis pendengaran, responden berhujah bahawa peguamcaranya, melalui surat bertarikh 6 Ogos 1994, yang mana sijil pengeposannya telah diperolehi, telah memberitahu perayu mengenai tarikh tersebut, dan telah juga mengemukakan sesalinan surat mahkamah mengenainya.
- H Maka itu, adalah agak jelas bahawa, sekiranya perayu berjaya dengan alasan pertamanya, perintah-perintah yang dibuat pada 11 Ogos 1994 haruslah diketepikan *ex debito justitiae*, yakni, tanpa perlu mempertimbang merit sama ada responden berhak atau tidak
- I kepada perintah milikan.

Diputuskan (membenarkan rayuan)
Oleh Abdul Aziz Mohamad HMR:

- (1) Hujah responden bahawa A. 62 k. 11 KMT terpakai pada kes di sini atas alasan bahawa oleh kerana peguamcara mereka telah diminta oleh mahkamah untuk memberitahu perayu, maka surat mereka harus dianggap sebagai notis dari pejabat Mahkamah Tinggi, tidak dapat diterima. In disebabkan, di bawah A. 28 k. 5(2) KMT, menjadi tugas responden untuk memberikan notis. Walau apapun, surat dari peguamcara tidak boleh secara realistiknya dianggap sebagai notis yang dihantar oleh pejabat Mahkamah Tinggi, dan begitu juga, peguamcara tidaklah boleh dianggap sebagai ejen Mahkamah Tinggi. Timbalan Pendaftar hanya memberitahu peguamcara mengenai tarikh dan menyerahkan kepada mereka, selaku peguamcara responden, untuk memberitahu perayu. Selain itu, dan walau apapun, ayat terakhir A. 62 k. 11 KMT kelihatannya telah melunturkan dengan berkesannya sebarang anggapan bahawa kaedah akan terpakai jika pihak terbabit dengan khusus menyangkal serahan, sepertimana yang dibuat oleh perayu, memandangkan bahawa itulah sahaja cara yang terbuka kepada perayu untuk membuktikan bahawa beliau tidak diserahi dengan notis. Peguam responden tidak menyebut mana-mana anggapan lain yang wujud bagi manfaat responden.
- (2) Serahan ke atas perayu tidak dibuktikan dan oleh kerana tiada bukti tentang serahan sebenar, responden perlu bergantung kepada suatu anggapan serahan, yang mana ia gagal menunjukkannya bagi sekeping surat yang dipos yang disokong oleh sijil pengeposan. Jikapun A. 62 k. 6(1) KMT membenar atau mengkehendaki serahan melalui pos, tanpa mengkhususkan pos berdaftar, ia semestinya melalui pos berdaftar, dan hanya selepas itu anggapan mengenai serahan dan masa serahan akan berbangkit sepertimana yang diperuntukkan oleh s. 12 Akta-Akta Tafsiran 1948 dan 1967. Selain tiada bukti serahan, berkemungkinan juga perayu tidak menerima surat peguamcara. Jika beliau menerimanya, adalah tidak mungkin bahawa beliau tidak akan hadir di mahkamah pada 11 Ogos 1994 untuk membantah pengambil-alihan milikan hartanah yang beliau cuba dipertahankan sebagai haknya, sementara beliau telah hadir pada pendengaran sebelumnya. Atas alasan-alasan ini, rayuan dibenarkan dan perintah-perintah yang dibuat pada 11 Ogos 1994 adalah diketepikan. Adalah

- A tidak perlu untuk mempertimbang merit bantahan perayu terhadap saman pemula. Saman pemula harus didengar secara *inter partes* dan di situ perayu berpeluang untuk mengemukakan merit kesnya.
- B **Legislation referred to:**
Interpretation Acts 1948 and 1967, s. 12
Rules of the High Court 1980, O. 28 r. 5(2), O. 62 rr. 6(1)(b), 11, O. 89
- C *For the appellant - Richard WG Lee (EL Teh with him); M/s Cheah Teh & Su*
For the respondent - Vengetraman Manickam; M/s Jayaratnam & Chong
[Appeal from High Court, Kuala Lumpur; Originating Summons No: S2-24-417-1994]
- D *Reported by Suresh Nathan*

JUDGMENT

E **Abdul Aziz Mohamad JCA:**

- F [1] The respondent bought the appellant's land at a statutory sale by public auction under the National Land Code conducted on 29 November 1993, pursuant to an order for sale dated 20 August 1991. The appellant had charged the land to a bank as security for a loan to a company. Unable to obtain possession of the land from the appellant, the respondent filed in the High Court an application by originating summons under O. 89 of the Rules of the High Court 1980 for an order for possession. The
- G originating summons was heard on 11 August 1994, in the absence of the appellant. An order for possession was granted on that day. It was also ordered that damages for the respondent be assessed by the deputy registrar.
- H [2] On 28 October 1994, the appellant filed a summons in chambers seeking an order setting aside the orders of 11 August 1994, and consequential and ancillary orders. On 29 September 1995, the appellant's application was dismissed with costs. The appellant appealed to this court. As the learned judge has not
- I prepared her grounds of decision, we have not had the benefit of knowing the views that she took, in dismissing the application, of the matters that were raised by the appellant in support of her setting-aside application.

[3] In this appeal the appellant has raised ten grounds for contending that the appeal should be allowed and the orders for possession and damages should be set aside. The first ground is that the appellant was not given notice of the hearing of the originating summons on 11 August 1994. If the appellant succeeds on the first ground, the orders made on 11 August 1994, have to be set aside *ex debito justitiae*, that is to say, without having to consider the merits of the question whether the respondent was otherwise entitled or not entitled to the order for possession. The second to the seventh grounds relate to alleged defects in the process of the auction and the statutory sale of the land and are designed to show that there are triable issues that pose a challenge to the validity of the respondent's title to the property and, consequently, to his locus standi to resort to proceedings under O. 89 to obtain possession of the property. It may be mentioned in this connection that on 14 December 1994, about two months after the appellant, as she claimed, first knew about the orders of 11 August 1994, and during the pendency of her setting-aside application, the appellant filed a writ action in which, among other things, she sought to invalidate the charge and the sale by auction. The eighth ground questions the validity of the orders made on 11 August 1994, by reason that they included an order for damages which it is contended cannot be made in an O. 89 application. The ninth and tenth grounds contend that in any case O. 89 cannot be resorted to, to obtain possession from a person, such as the appellant, who previously was the lawful owner of the property. The second to the tenth grounds are therefore grounds that go to the merits of the appellant's setting-aside application.

[4] The facts relating to the first ground are as follows. Originally, the date of hearing of the respondent's originating summons was 8 July 1994. On that date the appellant and her son went to the court for the hearing but was informed by an officer in his chambers, in which the respondent's counsel, Encik Krishnan Papoo, was also present, that the hearing was adjourned to some other date which would be notified to the appellant. This was averred by the appellant in her affidavit and there was no denial by the respondent of the appellant's statement of being present in the officer's chambers with Encik Krishnan Papoo on that date. So it has to be accepted as true that the appellant did

A go to court for the hearing on 8 July 1994. On 6 August 1994, a Saturday, the deputy registrar wrote to the respondent's then solicitors, Krishnan Papoo and Associates, informing them of the new date of hearing, 11 August 1994, a Thursday, and asking them to inform the appellant of the date.

B [5] In response to the appellant's averment by affidavit that she was never informed of the date of hearing, the respondent averred by affidavit that Krishnan Papoo and Associates had, by a letter dated 6 August 1994, for which a certificate of posting was obtained, informed the appellant of the date and forwarded a copy of the court's letter. The respondent exhibited a copy of the solicitors' letter and the certificate of posting. But the appellant responded by maintaining that she never received any notice of hearing. There was no actual proof that the appellant did receive the solicitors' letter.

C [6] Learned counsel for the appellant's argument in this appeal relied on law and fact. On the law, he said that if at all notification of the date of hearing was to be by post, according to O. 62 r. 6(1)(b) of the Rules of the High Court 1980, service of the solicitors' letter may be effected only "by prepaid registered post", which posting supported by a certificate of posting is not. As the appellant had pointedly denied receiving the letter and as there was no proof of actual receipt of it, the respondent, it was argued, had to rely on some presumption of receipt, but there was none in respect of a letter posted with the support of a certificate of posting, unlike the case of a registered letter, for which a presumption is provided by s. 12 of the Interpretation Acts 1948 and 1967. So the evidence of posting, it was argued, does not constitute proof that the appellant received the solicitors' letter.

D [7] On the factual side, the appellant's counsel argued that if the appellant had received the notice of the date of hearing, it was improbable that she would not have attended the hearing in view of the fact that she had gone to court on the earlier date and the fact that she had on 27 January 1992, paid the bank RM120,000 to settle the debt of about RM140,000. It is a fact that the principal amount of the loan, which was an overdraft, was RM120,000 and that on 31 August 1990, which was about a year before the order for sale, the amount owing to the bank was RM122,753.34. The payment of RM120,000 on 27 January 1992, was averred in para. 26 of the appellant's affidavit dated 10 November 1994. The averment was not disputed. 27 January

1992, was about five months after the order for sale and almost two years before the sale. It was argued that, the appellant having paid so much, it would not be logical, if she knew of the hearing date, that she did not take an interest in the property by attending court to oppose the respondent's endeavour to obtain possession of the property.

[8] In his reply, learned counsel for the respondent cited O. 62 r. 11, which allows notices sent from any office of the High Court to be sent by post. It provides as follows:

11. Notices sent from any office of the High Court may be sent by post; and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof, and the posting thereof shall be a sufficient service. But nothing in this rule shall prevent any party from establishing, if such be the case, that he has not been so served.

We understand counsel to be saying that O. 62 r. 11 should apply in this case on the basis that, since the solicitors were asked by the court to notify the appellant, their letter should be treated as a notice sent from an office of the High Court. That, in our opinion, cannot be done, because under O. 28 r. 5(2) the duty to give the notice was the respondent's. The rule provides as follows:

(2) If the hearing of a summons is adjourned generally, the party on whose application the day for its hearing was fixed under rule 2 may restore it to the list on two days' notice to all the other parties ...

In any case, we do not think that the letter by the solicitors can realistically be treated as a notice sent from an office of the High Court. Neither can the solicitors be treated as the agent of the High Court. The deputy registrar merely informed the solicitors of the date and left it to them, as a duty of the solicitors for the respondent, to inform the appellant. Further and in any case, the last sentence of O. 62 r. 11 seems to have the effect of neutralizing any presumption that the rule may carry if the party concerned categorically denies service, as the appellant did, for that is the only way available to him by which to establish that he has not been served. The respondent's counsel did not mention any other presumption that exists in the respondent's favour.

- A [9] We agree with the appellant's counsel that service on the appellant has not been proved. Since there is no proof of actual service, the respondent has to rely on some presumption of service, and none has been shown by the respondent to exist for a letter posted with the support of a certificate of posting. Even if
- B O. 62 r. 6(1) were to allow or require service by post, without specifying registered post, it has to be by registered post, and only then will there be a presumption as to the effecting of service and the time when service is effected. This is provided by s. 12 of the Interpretation Acts 1948 and 1967, which says:
- C 12. Where a written law authorises or requires a document to be served by post, then, until the contrary is proved, service:
- (a) shall be presumed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document; and
- D (b) shall be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of the post.
- E [10] Apart from absence of proof of service, we also agree with the appellant's counsel that in view of the two factors mentioned earlier, the probability is that the appellant did not receive the solicitors' letter. If she did, it is not probable that she would not have attended court on 11 August 1994, to resist the taking over
- F of possession of the property that she was resolved to retain as hers, the more so since she did attend on the previous occasion.
- G [11] For that reason we allow the appeal and set aside the orders made on 11 August 1994. It is not necessary to consider the merits of the appellant's opposition to the originating summons. There will have to be an inter partes hearing of the originating summons at which the appellant will have an opportunity to present the merits of her case. That, from what her counsel said in his oral submission, is what she desires.
- H [12] As to costs, we set aside the order for costs made by the High Court, but we order that the costs of this appeal and in the High Court follow the event of the originating summons, that is to say, whoever wins on the originating summons will get his or her costs of this appeal and of the setting-aside application in the
- I High Court. That is because we do not think it fair that if the respondent should succeed on his originating summons, he should

bear the appellant's costs in the High Court and of this appeal, since in the matter of service, and, more importantly, in the matters that the appellant has raised as to merits, we are unable to see that the respondent, who was just a buyer at an auction sale, was personally blameworthy.

[13] We also order that the deposit be refunded to the appellant.

A

B

C

D

E

F

G

H

I